



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

7/6



DB
ATN
PTH

STANFORD LAW LIBRARY



THE HISTORY
OF
The Law Merchant
AND
Negotiability.

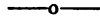
revised
Ernest
BY
1899-1926.
P. WILFRID, THORNELY,

Of the Inner Temple, Barrister-at-Law.

London, 1904.
Printed and Published by E. POUTEAU,
"Gray's Inn Press,"
231a, Gray's Inn Road, London, W.C.



PREFACE.



IN the following pages I have endeavoured to produce a short but continuous story of the rise and growth of the Law Merchant. The first five chapters are, for the most part, taken up with tracing the development of this law, and with a consideration of the courts by which its administration has from time to time been undertaken; while chapters VI. and VII. deal shortly with the question of negotiability,—a doctrine which is perhaps the most important outcome of the efforts of the merchants, continued through centuries, towards a general acknowledgment of their customs.

My indebtedness to the various learned authorities whose writings I have consulted, is but inadequately expressed by the references which appear throughout the work.

P. W. T.

*Fountain Court,
Temple, E.C.*

CONTENTS.

—o—

Chapter	I.—The Early Basis of the Law Merchant ...	PAGE. I
Chapter	II.—The Staple System... ..	11
Chapter	III.—The Admiralty Court	19
Chapter	IV.—Some Sixteenth Century Bills	26
Chapter	V.—The Law Merchant in the Common Law Courts	29
Chapter	VI.—Negotiability	31
Chapter	VII.—The Idea of Negotiability	38

The Law Merchant.

CHAPTER I.

The Early Basis of the Law Merchant.

Although the actual origin of the Law Merchant is enveloped in obscurity, this much may be said with certainty, it existed in its early stages as a body of varying customs obtaining among a certain class of the population—the class of merchants. As the number of the merchants increased, so the existence of these customs became more pronounced, with the result that they gradually became of sufficient importance to be generally recognised by the king's court, and finally to be included in the general law of the land.

A notable peculiarity of the Law Merchant in its earlier stages was its international character combined with its administration as purely local custom, at the same time it partook of the nature of the widest and of almost the narrowest system of law.

According to Blackstone, the English common law consisted of general customs, particular customs, and customs recognised by special jurisdictions—such as that of the Admiralty courts. In the earlier stages of our legal history particular customs, where they occurred, formed a kind of local common law, which was recognised, determined, and administered by purely local courts, but it is a historical fact that the king's courts gradually extended their own jurisdiction by encroaching upon that of the local courts, and consequently the king's judges became well acquainted with many of the more important local customs, and afterwards were prepared to accord them full judicial recognition. One of the most striking illustrations of this is to be found in the final and complete judicial recognition of the custom of gavelkind.

With regard to those customs above mentioned which were the peculiarity of special jurisdictions, certain tests, such as certainty, reasonableness, and immemoriality, were applied by the king's courts with a view to deciding upon their validity or invalidity, but these tests were never applied in the case of general customs. A case in point is reported in the Year Books during the reign of Henry IV., where the plaintiff and defendant lived respectively in adjoining

houses; the defendant's house was so negligently maintained as to take fire and cause the burning of the plaintiff's house, whereupon the plaintiff brought his action, and based it upon the common custom of the realm. To this the defence was raised that the declaration failed to show immemoriality, but it was overruled—"car comen ley de c'est Realme est comen custome de Realme." ^a

From the Year Books it is clear that the original writs formed an exception to the rule whereby it was necessary to specially plead the custom of the realm, but the reason for this was that such original writs dealt with matters so obviously wrong that no such basis was really needed. When a plaintiff sued in debt, detinue, or trespass, there was no necessity to refer to some charter or to the custom of England as being the basis of the claim; but when a plaintiff sued upon a matter which was altogether outside the scope of the original writ the basis of the claim was invariably stated. Later on, however, there was a tendency to drop this; for example, it was originally necessary, in an action against a common carrier, for the plaintiff to specially plead "custom of the realm," but in time the courts took judicial notice of this "custom of the realm," and it thereupon became sufficient to say that the defendant was a "common carrier." In this way did the English Law become uniform, unlike, as Hallam remarks, the French Law, which is a multitude of local customs.

It does not follow, however, from the foregoing that the custom of the realm thus made the common law was fixed and stereotyped, for there is a considerable amount of evidence to show that custom, or perhaps usage, could, for particular cases, vary the rules of the common law. Thus, at the present day, in cases where a man contracts in relation to the Stock Exchange, he is impliedly bound by the usages of that body, but it is a question of fact whether or not custom is an implied term in the contract, and a question of law whether that custom creates duties independent of contract. It is here then that the custom of Merchants came in touch with the common law. This custom of Merchants consisted of a body of mercantile usages affecting a comparatively large class of the community who had no existing legal relations with one another by privity of contract. As a matter of fact there is evidence that the custom of merchants or Law Merchant has been in existence for many centuries, but as a matter of actual law it is of modern origin.

There are well-known economic reasons for the growth of various sets of custom existing side by side with the custom of the realm or common law; and the history of this growth affords an illustration to the late Sir Henry Maine's famous remark that "the movement of all progressive societies has hitherto been from status to contract." Commencing with the formation of sub-classes of men, there is a tendency to confine their customs to the particular localities in which

^a Y.B. 2 Hen. IV. 18.

they live. Trade is confined to the great towns, and it is from the charters of these that we may properly expect to derive much of our information with regard to the early stages of the Law Merchant.

But in addition to the influence of these towns, a much stronger factor in the development of a general Law Merchant is to be found in the existence and popularity of the great fairs which were held, not only in England, but also in almost every part of the then civilised world, and to which traders from every nation resorted. This being so, a short consideration of a few of these fairs will not be out of place.

Fairs.

Most of our information respecting these is derived from the Hundred Rolls. The Doomsday Book refers to markets as being profitable rights belonging to, and forming, a franchise, as part of a lord's seignory, but fairs are rarely mentioned. The inference, then, to be drawn from this is that, at least as a general rule, they were places in which men could meet, for the purposes of commerce, free from the payment of any of those tolls which always accrued to the privileged owner of a market. It would also seem that these fairs belonged by charter, either to a monastery or some great town.

One of the greatest English commercial towns of the time was Cambridge. It was a natural trade centre owing to its position at the junction of several of the trunk roads, whilst its situation upon a navigable river from King's Lynn rendered it easy of access for English and Continental Merchants whose ships sailed the North Sea. We are told that even before the Norman Conquest, Irish merchants were in the habit of visiting Cambridge with cloth, and it is interesting to note that the Oxford Colleges obtained from Cambridge their stock of salted eels and other fish for Lenten consumption.

At or near this town then, there were four annual fairs of considerable importance. One, called nowadays "Midsummer Fair," was held for a period of four days from the vigil of St. John the Baptist onward, this belonged to the prior of Barnwell and for it he paid a silver mark. Another was the Garlic Fair lasting for two days from the feast of the Assumption of the Virgin; this belonged to the prioress and nuns of St. Rhadegund. A third belonged to the burgesses of Cambridge and was held during Rogation days, while a fourth was held on Holy Cross Vigil and was the franchise of the lepers' hospital; this still survives in Stourbridge fair, which was the largest and most important of all the English fairs. Another fair of importance was held at St. Ives (in Huntingdonshire), but although this institution is (for it still exists) also one of considerable antiquity, there can be no doubt that it did not come into being before the year 1002—the date of the discovery of the supposed relics at the town. This fair was noted for the quality of the clothes sold there.^b

^b Reules Seynt Robert.

The connexion between religious and commercial enterprise during the earlier periods of European civilisation is apparent both in England and upon the Continent. From very early times men have been in the habit of gathering to celebrate by funeral games the memory of their heroes, and these general meetings led to trading. People came in from the surrounding districts, and, where these funeral games became a periodical institution, there arose a fair. Later on, the tomb of each martyr and the burial place of each saint—and these were not infrequent in the Middle Ages—gave an opportunity for a general gathering, periodical or otherwise, of the local inhabitants and travellers. Thus institutions, originally religious, gradually became commercial, and so it became a universal rule that the spread of Christianity was invariably followed by an increase of trade.

England's foreign trade was for the most part confined to Southern lands, and Englishmen frequented the fairs at Rouen, St. Denys, Troyes, and elsewhere in the dominions of Charles the Great, and, in a letter to the Offa of Mercia, Charles undertook to treat these men with justice and grant them his protection. This letter, dated A.D. 796, may fairly be said to constitute our first commercial treaty. In 1194 the men of Cologne were allowed by Henry II. to buy and sell at all fairs throughout England, and this concession was confirmed by John and Henry III.

Another great continental fair was held at Elsinore, and we have it on the authority of Worsaae (Danes and Norwegians, 100) that merchants from all parts assembled there for the annual fair. It appears that along the shore booths were erected, wherein fish, hides and valuable furs were bartered for foreign wares, while the gathering was noted for its games and merry-making.

A large number of these fairs would seem to have been little better than slave markets. We are told that "Helmold beheld at once, in the market of Meclinberg, 700 Danes exposed for sale."

The rise of the town of Great Yearmouth was due to a herring fair established there and managed by the authorities of the Cinque Ports; but although the existence of a fair was no doubt looked upon as a boon, at least to the local inhabitants, attempts to found one were not always successful. Thus, in Edwards VI's reign, it was proposed to establish a fair at Southampton to remain open for five weeks after Whit Sunday, but to close before St. James's fair at Bristol and St. Bartholemew's fair in London, but the scheme proved a failure.

At these various fairs disputes were settled by the courts of "Pypoudre," courts by which was administered the Law Merchant of the period; but by the year 1478 the regulation of the English fairs was generally unsatisfactory, while the pypoudre courts were working badly and continually exceeding their jurisdiction. In 1554 it was provided that countrymen might not retail their wares in market towns except during the continuance of a fair, and it is of interest to note that

when a debt was acknowledged before the royal officers in specified towns, and at certain fairs, distraint under the King's seal could be made in default of payment. This is one of the earliest examples of a contract of record.

The Position of the Merchants in the Middle Ages.

Since it was a rule of the English common law that place of birth was all important, it follows that aliens were naturally under legal disabilities. Later in the Middle Ages an alien merchant was permitted to hire a house for the purposes of his trade; He might possess goods and chattels and will them away, or have them administered on his intestacy, but we have it on the authority of Littleton that he could bring neither real nor personal action. These rules were but a logical outcome of the law of feudal contract; they can be traced no further back than the thirteenth century.

During the Plantagenet period the Kingdom comprised England, Scotland, Ireland and a large portion of France. That its population was of a cosmopolitan character is evidenced by the fact that in England alone there was a mixture of Saxons, Danes and Normans; and when this is taken into consideration, the conclusion to be drawn is that the alien was, a priori, at no great disadvantage. The loss, however, of one after the other of our French possessions, brought about disabling laws. The idea grew that the alien was the subject of another sovereign, and that consequently it was only right that he should be deprived of certain advantages until English subjects abroad should have those advantages granted to them.

The three great nationalities of the aliens were French, German and Italian. The French alien chiefly desired land, but the Germans and Italians came merely as merchants, having no desire for lands, their object being trade and not settlement, and thus they rarely came into contact with the common law. They lived, temporarily, in the chartered towns^c, and it was not long before conflict arose between these towns and the merchants therein. The towns became hostile to these aliens and claimed to restrict their activity within narrow limits, but the movement was opposed by the King and Barons who found the aliens useful, as persons always ready to pay for favours, and lend money, as well as to lower prices generally; hence in the Great Charter provision was made to enable merchants to freely enter, dwell in, and depart from the Realm.

Throughout the Middle Ages the proper court for an alien to sue in was the court of Chancery, where the foreign merchants gained a hearing rather as persons privileged by the King than as litigants subject to, and entitled to the benefits of, the ordinary law of the land.

^c See later sub. tit. 'Staple.'

So much, then, for the law administered to the merchant who was a denizen, but apart from this there was a body of rules, which were distinct even from the common law. These rules formed a code of law to be applied rather to a particular class of mercantile transactions, than to a class of men, in that they consisted chiefly of a group of rules of evidence, such as the proof to be given of sales and contracts, the value of the tally, and the nature of earnest money. They were rules which were regarded as being specially known to merchants, and which were declared by them in the courts holden at fairs and markets: they were rules which were not looked upon as purely English but as a *jus gentium* known and acknowledged by all the merchants of the then known world. It is the development of these rules especially in England that must now be considered.

It is a matter of considerable doubt whether or not the Law Merchant can be traced back to the influence of Roman Law, but it is a noteworthy fact that everywhere it was the Italian merchant who was presumed to be the best acquainted with its principles. The Law Merchant, though it in time became a modern *jus gentium*, is not identical with the modern form. It may have been based upon the Law of Nature but there is nothing to show that the two doctrines together identified by Justinian formed the basis of our modern rules. Perhaps the most important outcome of the Law Merchant (at least so far as the people of the twentieth century are concerned) is the doctrine of negotiability combined with the existence of negotiable instruments; and it is interesting to note that the history of the negotiable instrument shews a continual desire, upon the part of the merchants, to evade two of the fundamental rules of primitive law, viz:—one person may not represent another in procedure, and that a right, as distinct from a thing, cannot be assigned.

These two rules were a great restraint upon the merchants of early times, but the later Roman Law overcame the difficulties arising out of the first, by a scheme of procurators, and out of the second, in commercial transactions, by the identification of *cautio* with *constitutum* and *receptum* by means of which a kind of negotiability arose. This line of investigation might eventually account for the peculiar customs of the Lombard bankers.

Constitutum was a bare promise to pay an existing debt, which might be the promisor's or another's. In the latter case one person undertook that upon a given day he would discharge another's liability, and nothing short of actual satisfaction released him, for he was a solidary debtor, though he could claim that the original debtor should be sued first. The Roman banker, or *argentarius*, who had received his customer's money, was under an informal promise to repay that money on demand—a promise which could be enforced by the *Actio Receptitia*, for the term "*recipere*" not only meant to receive goods, but also to give a personal guarantee with regard to

them. This method could be used in many cases where the formal *expensilatio* could not. Again there could be no *transcriptio a persona in personam* by peregrins, but there was no reason why the banker should not agree to pay B. instead of A. out of the money which A. had entrusted to him.

Thus could an informal assignment of obligations take place, especially if the customer (A) had given his creditor (B) a *chirographum*, or written document evidencing the debt, for such documents, though only cautiones, became eventually so akin to formal documents, as to be practically binding. Hence the result that the banker would have to pay the person who presented the cautio. It is but a small step from this idea to that of the acceptance of a bill of exchange or promissory note.

The foregoing is very strongly supported by an actual example mentioned by Brunner^d—it is as follows—"I. W. confess and acknowledge to you, G. and R., that I had and received, on the ground of exchange, from you £216 13s. 4d. Pisa money, renouncing, &c. (i.e., certain *exceptiones*, or benefits prima facie open to him^e), for which said sum I promise by stipulation to give and pay you or your partners or anyone whom you shall have commanded £100 of French coin at Paris."^f This seems to show that these people (G. and R.) desired to be credited with money in Paris, but that they did not wish to carry or send actual coin there. The document is fully in accordance with a Piacenza Ordinance of 1391^g which compelled campsores, or money-dealers, to give a written acknowledgment of money deposited with them. The case is curiously like the Roman *Cautio* above referred to, and the temptation to identify them is strong. It would be irresistible but for two considerations. *Cautio* belonged to the latest development of Roman Law, and was to be found in the works of Justinian, but these works were not the sources of men's knowledge during the early Middle Ages. And again, such Roman Law as did exist was of a much more undeveloped nature, especially where the people among whom it so existed were not of Italian origin. Thus, whilst early law permitted no representation, in matters of procedure at least, in practice its place was taken by the Roman Law *adstipulation*, which was to be found in use in England and on the Continent as late as the twelfth century, although it had become practically obsolete in Rome itself by the end of the second century.

Any attempt, therefore, to trace the origin of negotiability to the doctrines of Roman Law must, on the whole, be foredoomed to failure. It must be assumed, then, that negotiability originated in the practical needs of the merchants and in the consequent establishment of special

^d Das französische Inhaberpapier, p. 73. ^e e.g., the Exceptio non numeratæ pecuniæ. ^f The document is dated 124½, and is to be found in the archives of Marseilles. ^g Printed in Martens app. p. 18.

customs peculiar to this class ; and these customs, as above indicated, came in time to be regarded as a *Jus Gentium*, that is, as being of universal application among one class of the population of the civilised world.

The rules of the Law Merchant are based upon :—

1. *Dooms and Judgments, e.g.*, Decisions by councils such as the Council of the city of Trani on the Adriatic (XIth century), or the Judgments of Oleron, an island near Bordeaux (XIth century), or the Laws of Wisby and Gothland (XIVth century).
2. *Collections of Maritime usages or customs, e.g.*, Consolato del mare (Barcelona A.D. 1400), or the *Customaries of Oleron*.

The judgments of Oleron were of considerable importance, and have been described as a part of English Law, the tradition being that Richard I. brought them from Palestine ; whether or not this legend be true, it is certain that the judgments of Oleron had universal application, and were regarded, at least by the merchants, as being of the utmost value. An Oleron judgment was as binding as a decision of prudhommes given under privileges granted by the Crown.

In the archives of the City of London there are to be found two MSS., one of which is called the “Liber Horn,” and the other the “Liber Memorandum.” The former, as its name implies, is supposed to be the work of one Horn, who, in Edward II’s reign, was City Chamberlain, and the book includes a copy of the Laws of Oleron. The “Liber Memorandum” contains another copy of these laws, and these copies appear to have been kept for reference and every day use.

The case of *Pilk v. Venore* was tried “in plena curia majore et ballivis et aliis probis hominibus villæ et magistris et marinariis,” and the law of Oleron was pleaded by both plaintiff and defendant. Judgment was given by the Mayor and bailiffs of Bristol, and by it a shipmaster was held to be liable for loss of cargo owing to theft on the part of members of the crew. This judgment was certified to the Chancellor as having been given according to the law and custom of Oleron.^h

From a MS. in the Royal Library in the Escorial of Spain it appears that the rolls of judgments of Oleron were adopted in Castile at the instance of Alphonso X. in the XIIIth century, as the actual law to be administered in all suits between merchants ; and it would also appear, from the same source, that the laws in the fifth Partida of that body of the Castilian Law known as the Siete Partidas were formed in accordance with, and on the basis of these rolls or judgments of Oleron. In all countries bordering upon the Atlantic Ocean and the North Sea these judgments obtained. In Flanders, there were to be found translated into the Flemish tongue, twenty-four

^h *Brevia Regis Tr. An. 24 Edward III. nu. 44, Bristol.*

articles, which closely corresponded to the twenty-four rules of Oleron, as used in England, whilst the Breton merchants went direct to Oleron for their decisions.

In 1285 complaints were made to the King by the barons of the Cinque Ports that the merchants of Gascony, England, Wales and Ireland were in the habit of compelling English shipowners to contribute for jettison on vessels, apparel and stores, and it was held by Edward I. that only merchandise should so contribute, thus overruling the Roman Law rule and the judgments of Oleron, which empowered the shipmaster to sell furniture and merchandise for the expenses of the ship.

These judgments of Oleron were concerned, for the most part, with matters affecting the transport of merchandise upon the seas, and the captain's various legal duties and powers. They dealt with his power of selling cargo, in order to meet necessary expenses, his duties in case of wreck, sickness of, or injury to the sailors, jettison, collision, and wages, with the time at which payment must be made for freight, and with the master's lien on freight, contribution for jettison, liability of pilots, and similar questions.

The courts wherein these rules of the Law Merchant obtained were distinct from the ordinary courts of law in England. At first there was an apparent absence of writing, for customs were declared orally by such persons as knew them or remembered the decision in a similar case. This peculiarity is traceable to the absence from these courts of the clergy, who were practically the only people able to read. After the Crusades, however, writing and written customs appear.

The case of 1285 above mentioned, wherein the King gave judgment on a certain complaint on the part of the barons of the Cinque Ports, shows that judgments were given in Chancery upon mercantile matters. In another case (1274^j) certain Frenchmen of Bordeaux similarly complained of C. & D., who were "peers, parceners and commoners of the communitas of Norwich," and of R. and John, his son, for that they unjustly deformed the plaintiff of £8 which they ought to pay to him or "*cuicunque de suis scriptum obligatum inter ipsos confectum portanti.*" The basis of the debt was wine sold by B. (the plaintiff) to the said R. and John, his son, at the Boston fair, which was held on St. James's day, 1273, and there was evidence of a promissory note. In this case the following points are worthy of notice—(a) The defendants are R. and J. *and the community.* (b) The debt was contracted during the previous year. (c) The plea was in the form of trespass. (d) The proceedings were on *praescriptum obligatum* or bill obligatory, and (e) the bill was to be paid to bearer—"cuicunque de suis."

But the merchants preferred deciding their disputes for themselves

rather than having it done for them by the King in Chancery, and this desire upon the part of the merchants gave rise to the court of "Prudhommes," and the court of "Staple" — of which more hereafter.

With regard to the former of these two courts an interesting provision is to be found in the Domesday of Ipswich to the effect that "the pleas betwixt strange folk that men call pyponderns shall be pleaded from day to day in time of fair, between strange and passing from hour to hour, belonging to the maritime, to wit for strange mariners passing and for those abiding till one tide, from tide to tide." A case which illustrates it appears before Hubert de Burg in the reign of Henry III., when the question arose whether the bailiffs of London might determine complaints for debt or injuries presented by persons passing through the city, if these persons, or pyponderns, stayed for an hour or so only, or whether such cases should go to the sittings of the hustings. The contention of the citizens was that such complaints were never heard outside the hustings, however, it was provided that, for the future, the Mayor, Sheriff, and two Aldermen should sit from day to day.

One of Henry III.'s charters enacted that pleas outside the walls should not be held except for merchandise, and states such pleas to be usually decided by the Law Merchant in boroughs, and at fairs by four or five citizens then present. Edward I. ordered that the Warden and Bailiff should hear these pleas and give speedy redress. The Pypoudre courts were situated in every fair and market of any importance, and were courts of record, but it is a matter of regret that these records have nearly all been lost or destroyed.

CHAPTER II.

The Staple System.

The number of staples was limited. The staple commodities were wool, leather, woollfells, lead, tin, butter and cheese, and the staple ports were the chief ports from which these commodities were shipped. The Staple Law consisted of the ordinances and customs of the merchants, or members of the staple.

The Statute of Staple 27 Edward III. prohibited the King's judges from interfering with this system, for people of the staple were to be ruled by the staple, and the jury in their courts was to be selected in accordance with the nationality of the litigants. The Mayor of the staple town was chosen by natives and strangers alike, while the constables were chosen only by the merchants, and foreign merchants were to elect two of their number, one from the North and the other from the South, to assist in the hearing of the pleas of aliens.

The Staple System was, in its time, an extremely important factor in directing the commercial activities of this country; its precise origin is veiled in obscurity, but it is not difficult to understand generally how its existence came about. Until the close of Edward's III's reign English subjects were not encouraged to trade abroad, the policy of the government was certainly, if unintentionally, opposed to this, and so up to that period there was rivalry between the English and foreign merchant only so far as the home trade was concerned. By a statute of 27 Edward III. it was enacted that denizens and foreigners alike might make their purchases in England, and that they should both be free to convey the staple articles so purchased to the sea-coast, but thenceforward it was only the alien who was permitted to carry the goods. Particular provision even was made to prevent the Englishman exporting wool in the name of an alien, or having agents abroad for the purpose, or even receiving payment for the same abroad. Under these circumstances it was only natural that there should have been intense jealousy between the Englishman who was thus forbidden to carry on an export trade, and the alien who had every opportunity of coming here and carrying it on, and generally interfering with such of the Englishman's trade as remained opened to him.

It is not difficult to assign a reason for this favour being shewn to foreigners, for it was from them, and more especially from the Hebraic element among them, that the English crown, and the English nobles were able to obtain the considerable loans that were often needed. The foreigner was by no means unwilling to pay, and pay well, for trade concessions, with the result that even if the loan were never repaid the lender was, comparatively often, none the worse off.

Probably not until the reign of Richard II. did the export trade of the country become organised, and the basis upon which it was then

put was the work of the merchants of the staple, or staplers as they were called. ^a

The advancement of the mediæval English merchant had been slow, but none the less steady, and it was at the close of the thirteenth and the beginning of the fourteenth centuries that he reached the zenith of his prosperity, and the towns, the scenes of his commercial activity, were in their most flourishing condition.

Onerous as were the restrictions on foreign trade, a few English merchants were always to be found who had braved the penalties of the statute and conducted a more or less flourishing, if precarious, trade with foreign citizens. In 1313 a mayor of the English merchants trading in Flanders was called upon to settle certain disputes ^b and from this it may be gathered that at least in one place on the Continent there was an organised body of English traders, while the probability is that the other markets in Brabant, Antwerp and Flanders were visited by the English at an earlier date.

The Staple System became a distinct and recognised organisation in Edward III.'s reign, and thereafter for many years it exerted a powerful influence over the trade of the country. The tendency during the fourteenth century was to draw trade from the periodical fairs, and to establish it on a firmer basis in certain towns where all the year round goods were to be found for sale, and where trading thus might be carried on continuously. These towns were the staple towns, and became as it were the official dépôts of the merchants of the staple. A similar movement appears to have been on foot on the Continent, where Bergen in Norway was constituted the staple for the Iceland trade and where, in 1314, Philip of France endeavoured to attract the English to the staple at St. Omer, in place of the fair at Lille. ^c

There were four main objects of the Staple System :—

First, it made the taking of royal customs and tolls an easier matter than if merchants and manufacturers were permitted to ship their goods from any port in the country they chose ; and these customs and tolls constituted in those days no small proportion of the King's personal income.

Secondly, the Staple System did much to keep up the standard of produce ; it provided elaborate machinery for the examination by responsible officials of the goods to be sold, and the fact that produce bore an official mark was a kind of warranty that it was of a certain quality, or quantity, or both. Wool intended for exportation had to be taken to one of the fifteen staple towns mentioned in the statute of 27 Edward III., weighed and certified there, and, where the particular staple town was not itself a seaport, weighed and certified again at the port of shipment.

^a Cunningham : *English Industry and Commerce*, I. 290-291.

^b Rymer, *Foedera*, II. 202.

Thirdly, the system was used to bring gold into the country by reason of the merchants refusing to take anything but gold and silver in payment for their goods. Edward III., Richard II. and Henry VI. adopted plans with regard to the staple whereby that institution was used to bring bullion into the country.

Fourthly, the system provided a court of justice which met with the approval of foreign merchants, and which encouraged them to place their goods upon the English market, by removing any fear that they might have, that they would, in the case of a dispute arising, be subjected to the administration of a system of law which they did not understand, or that there might be delay in the hearing of their cases.

The staple courts had at one time criminal jurisdiction granted to them^d to try felonies committed by or upon members of the staple, or their servants, or agents, but this was shortly afterwards withdrawn.^e The mayors, sheriffs and bailiffs of the towns where staples were held, were directed to help the mayors and constables of the staples in their administrative duties,^f but this no doubt was intended to apply only in those cases where the municipal offices were not combined with those of the staple. The amalgamation of municipal and staple offices gradually took place, for as a rule the mayor of the town was a person eminently suited to fill the post of mayor of the staple; the former office was required by statute to be held by a man who was well acquainted with the Law Merchant, and the one whom the burgesses of the town would choose as their mayor, would almost certainly be a man possessing such knowledge. As to the date of this amalgamation, it probably took place between 1373 and 1479, if the town of Bristol may be taken as properly representative of other staple towns^g for from the words of a charter granted to that city by Edward III., in 1373, we are able to gather that the municipal and staple offices there were not held by the same persons, whilst a contrary conclusion is to be drawn from a book called "The Maire of Bristowe is Register, or ellis the Maire is Kalendar," written by one Robert Ricart, town clerk of the city in 1479.

The foreign merchant could not be compelled to sue in the local court, for it was open to him to sue in Chancery, or the common law courts, while an appeal lay to the King in Chancery from the decision of the local court. In the year 13 Edward IV., the case of an alien merchant was heard in the Starred Chamber,^h and the Chancellor held that so far from being bound to sue in the ordinary courts, the foreigner ought to sue in that court, where he would have administered to him the Law Merchant, which was the universal law of the world, the Chancellor's dictum being:—

"C'est suit est pris par un marchand alien que est venus par safe

^c Cunningham, I. 293.

^d 27 Edward III. c. 8.

^e 36 Edward III. c. 7.

^f 27 Edward III. c. 21.

^g Seyer's Bristol Charters, pp. 52 et seq.

conduit icy, et il n'est tenu de suer selonques le ley del Terre a tarier le trial de xii homes et autres solempnities del ley de terre, mes doit suer icy et sera determine selonques le ley de Nature en le Chancery, viz., ley Marchant que est ley universal par tout le monde."

(It is noteworthy that the Chancellor here confused the law of nations and the law of nature, as did his Roman predecessors.)

Notwithstanding these cases in the Starred Chamber, the probability is that only issues of great importance were carried to this higher court, and that for ordinary cases the local courts fulfilled the requirements of the merchant litigants.

The merchants of the staple were practically incorporated by the Ordinance of the staple; which was the joint work of the council in 1353 and the Parliament of 1354, the result being embodied in 27 Edward III. cc. 21-28. In every staple town a mayor and two constables were annually to be chosen "having knowledge of the law merchant, to govern the staple." Correctors also were to be appointed to record bargains, while two merchant aliens were to be selected to sit as associates in the court presided over by the mayor and constables aforesaid, and there were to be six "mediators" between buyers and sellers.

Further, the Ordinance of the staple provided for the supremacy of the staple over numerous local rights and functions—"we will, grant, and ordain that all the said things be firmly kept and holden, in all points, notwithstanding franchise, custom, privilege, exemption judgments, or other grants made to Cities, Boroughs, Towns, Commonalties, people of the Five Ports, other ports, or any other singular persons whatsoever . . . saving in other things to the Prelates, Dukes, Earls, Barons, and other Lords, their fairs, markets, Hundreds, Wapentakes, Leets, Jurisdictions, Courts, Franchises, and Privileges, and all other things to them pertaining in the places where the Staple be."

These local rights could be overridden with impunity so long as the staple was fixed in English towns, but in the reign of Edward III. it was for some time fixed in the Flemish cities, and here there was no such power.

In the year 1363 the only continental staple open to the importation of the chief English commodities—wools, skins, worsteds, cheese, butter, lead, tin, coal, and grindstone—was fixed at Calais, and all English staple produce intended for exportation was to be taken there direct, the port for this purpose being for the Northern counties of Richmondshire and Northallertonshire, Newcastle. This staple was removed several times, from Calais to England and back again; its establishment, however, at Calais was confirmed by two statutesⁱ and finally fixed there in 1423.^j

^h Y.B. 13 Edward IV. f. 9 pt. 5.

ⁱ 3 Edward III., c. 1. & 4 Edward.

^j 2 Henry VI. c. 4.

Royal convenience was a most important consideration in the choice of any place as a staple town, but Calais was, apart from this, eminently suitable for the institution, both from its geographical situation, and from the fact that there were there no franchises or fairs, or, in short, anything which would at all interfere with the complete control of trade by the staplers. Calais then, being a staple town of great importance, a short consideration of its constitution and conditions will not be out of place, especially when it is remembered that the other staple towns were of a similar character, and that generally speaking, any one of them might be taken as a type of the remainder.

Originally Calais was a Flemish town. The building of its port was commenced in the eleventh century by Baldwin IV. of Flanders who was over-lord of Boulogne and Guines, and the town was fortified in 1228 by Philip, Count of Boulogne. Then it fell into English hands and became of importance both commercially, as above shewn, and strategically. Its garrison, together with that of Berwick, constituted almost the only standing army of the English crown, but these garrisons formed a considerable item in the royal expenditure, and not infrequently the soldiers stationed at Calais were paid directly by the merchants there.^k This payment was not always made in sterling, for foreign money circulated there freely, at least half the price of wool was usually paid in bullion and there was a mint in the town, at which this was supposed to be recoined.

Apart from the officers of the staple, there was at Calais a city corporation, and we learn from a letter^l of 24th February, 1483/4 written by Wylliam Cely to Richard and George Cely "merchantes of the Stappell at Callez at London in Martt Lane," that aldermen of Calais who were also freemen of the Staple had been ordered by the staple court to resign from one position or the other. "Furder more plese hytt yowre masterschypps to understand that ther ys an ordynaunce made here be Courtt for the alldormen of Callez which be freemen of the stappel how th [er] they schall lewe ther alldermanschypp and all oder jurdyccyons in Callez be a day exprest and be only of the stappul or elles to be crossyd the plase and soo oon . . . wherfor ther ys an ordynaunce made they schall come in and schow hem as frenen of the plase and forsake ther alldermanschypp and jurdyccyon of the town or elles yff they wold nott they schuld schewe hytt theyr and they schuld be dyschargyd of ther fredome of the stappell . . ."

The merchants and their agents resided in what amounted to licensed lodgings, subject to the regulation of the mayor and court of the staple, an arrangement similar to that obtaining in the Universities of Oxford and Cambridge to day. So far as can be gathered, the terms for board were about 3/4 and 2/8 per week, according as the boarder took his meals at the high, or at the side table.

^k The Cely Papers by H. E. Malden. Letter, May 8th, 1478.

^l The Cely Papers p. 138-140.

The Court of the Staple dealt with all the civil business in which staplers were concerned ; a recognisance "in the nature of a Statute Staple" in connexion with some English property, was executed at the Calais Court. The town was attached to the see of Canterbury, and to the Archbishop's court accordingly went all ecclesiastical matters, but the civil administration of the staple court was only bounded by the isolated cases where the King had granted individual trading licenses. These cases were isolated because it was not to the interest of the royal authority to interfere with the staple, but rather the contrary. There was a subsidy upon wool and woolfells which brought no small amount into the royal exchequer, and in order that this income might be maintained, and if possible increased, it was desirable that the trade should be concentrated.

Calais was the natural gate through which the English trade with Flanders passed, and of all the staple commodities sold there, wool and woolfells probably formed by far the most important part ; the Flemish towns obtained nearly the whole of their wool supplies from England through the Calais dépôts, and the chief wool customers at Calais came from the Netherlands, a few Lombards and Florentines came, but the majority of the dealers were from Bruges, Ghent, Ypres, Mechlin, Middleburg and Delft, the great industrial cities of the Netherlands.

The trade regulations of the staple were stringent. Wool which was taken to Calais in or before the February of any year, and which remained unsold by the following April 6th, was classed as "old wool," and it was the rule that one sampler of this was to be sold with every three of the new wool. This old wool was subject to inspection, and there were regulations to the effect that the purchaser should not be compelled to pay for it a price greater than that at which it was valued on first coming to Calais, or than that at which new wool of a similar kind was being sold. In the case of alleged fraud the matter had to be placed before valuers appointed by the Captain and Lieutenant of the town, such valuers to be persons other than those engaged upon the original valuation of the wool on its being unshipped. Again, if any clothmaker or merchant was in the habit of purchasing a particular kind of wool he could not be forced to take another kind, but if his purchases were usually of different kinds of wool, he was bound by the rule directing the disposition of "old wool," if there were any of it left unsold ; and of this old wool he had to take his share, subject to the valuation.

On 25th March, 1454, the goods of certain Englishmen were seized at Nieupoort as compensation for property taken from merchants of Ostend by some English, and in consequence the English merchants of the staple at Calais were with difficulty dissuaded by the Lieutenant from arresting a Fleming, Gyesbryght by name, in retaliation for this

outrage. Finally it was arranged that a deputation should be sent to the Flemish Council sitting at Ghent to remind them of an institution dating from the days of Philip the Good, and consistently confirmed by each subsequent Duke, to the effect that goods belonging to persons of either nation should be free from seizure by way of retaliation for depredations committed by fellow-countrymen of those persons.

This Anglo-Flemish treaty was a very important one for the merchants whose goods were conveyed from one place to another on the Continent, often at considerable risk both to person and property. Pirates abounded on the seas, and highway robbers and disbanded soldiers on the roads, thus making travelling, and especially travelling with valuables, unsafe, so that a treaty of this kind did much to check the mediæval sense of justice which allowed an English merchant, who was robbed of his goods by Flemish highwaymen, to go straightway and plunder the next Flemish merchant he met, and so recoup his loss.

We learn that, on the 10th February 1484, certain Flemings on their way to England invoked the aid of the Calais staple in their efforts to recover goods which had been stolen and taken to Sandwich, while Richard III. was there. They argued that they were entitled to this help because under the treaty above mentioned Flemings invariably restored wrongfully seized English goods.

Again, on 27th March 1484, a deputation was sent from the Calais Staple to the Duke Philip and his Council of Flanders on the same point of Englishmen and Flemings being made answerable in Flanders and Calais respectively, only for their personal misdeeds, and not for those of their fellow-countrymen.

Thus the negotiations between the members of a staple in one country and those of a staple situate in another, became matters of international import, and no doubt gave great prominence to the system as a whole. The staple courts benefitted by this, and with that strong desire for extension of jurisdiction, which was such a marked characteristic of the courts of the Middle Ages, they gradually increased their influence till we find a statute of Henry VIII. reciting the fact that the "Mayors of the Staple have taken note of other matter than merchandise," and going on to give the general public the advantage of the Staple Law. From this statute too, it is clear that these courts still retained their chief peculiarity, namely, the merchants themselves sat as judges, and administered the law which they themselves were, in their private capacities, helping to develop. These merchants could both introduce and adjudicate upon new customs, and they were liable when a mercantile case in any way came up before the King's Courts, to be summoned thither in order to state the particular custom of merchants upon which the case turned. An instance of this is to be found in the case of one Simon Dederit, a foreigner, who appealed to "Dominus Rex" at Westminster on a

point of mercantile law, decided by the court at the fair of St. Ives, for the sheriffs of London, Lincoln, Winchester and Northampton were commanded to produce before the king twelve good and lawful merchants, for the purposes of the case.ⁿ

ⁿ 8 Edward II. cor. reg. Plac. in Dom. Cap. Westm. 321.

CHAPTER III.

The Court of Admiralty.

So far then the growth of the set of customs which formed the Law Merchant has been traced, together with the administration of that body of rules, by the local courts. But while the court of the Staple was yet flourishing, and gradually extending its influence, there came into existence another court which attained to greater and greater prominence, and which finally wrested the administration of mercantile affairs from the older courts by assuming powers entirely foreign to its original jurisdiction. This was the Court of Admiralty.

This court was founded for the purpose of dealing with cases of piracy, and the date of its origin is probably, almost certainly, somewhere in the period from 1340 to 1357. In 1340 the battle of Sluys was fought, and its result left Edward III., for the time, lord of the seas. Then the court must have commenced to assume the position in which it was to be found at the end of the century.

At the head of this court was the admiral himself, and the patent of Sir John de Beauchamp, who in 1360 was made admiral of the North, South and West English fleets, accorded him "full power by the tenor of these presents of hearing plaints of all and singular the matters that touch the office of the Admiral, and of taking cognisance of maritime causes, and of doing justice, and of correcting and punishing offences, and of imprisoning [offenders] and of setting at liberty prisoners who ought to be set at liberty, and of doing all other things that appertain to the office of admiral as they ought to be done of right and according to the maritime law."

That this new court was not altogether popular, at least in its infancy, may be gathered from a reference to it in the Black Book of the Admiralty, wherein there is an article forbidding the withdrawal of causes set down for hearing in the Admiral's court. The probable date of this part of the book is 1337-1351, and the compilation included many documents in connexion with the tribunal. The article above mentioned tends to shew that the new court needed official support, owing to its unpopularity. The existence of such a feeling of distrust in the minds of persons affected by the admiral's jurisdiction, is further evidenced by a petition which in 1371 was presented to Parliament, complaining that the people were being vexed by a novel procedure,—no doubt the procedure of this court.

In proof of the rapid strides made by the admiral's court, we find that in 1377 wreck and salvage cases were being heard before it—matters which had always been within the jurisdiction of the Common Law Courts.

So marked in fact was the interference in cases of wreck, that soon afterwards the alleged jurisdiction was restrained by statute; but the criminal jurisdiction of the court was always recognised. In 1361,

a commission issued to Sir R. Herle, who had just been appointed admiral, and others, to try a case of murder and piracy according to the common law—"secundum legem et consuetudinem regni nostri;" but this was withdrawn on the recommendation of the Council that felonies, trespasses and injuries done upon the sea were triable before the admiral in accordance with the law maritime, instead of before the common law justices,—"*esse consonum dictae legi et consuetudine quod feloniae transgressionibus seu injuriarum super mare factarum non coram Justiciariis nostris ad communem legem sed coram admirallis nostris juxta legem maritimarum deducantur et terminentur.*" Piracy, it is interesting to note, was not a felony at common law, at least in 1429.

From 1361 until the passing of 28 Henry VIII. c. 15 cases of piracy, civil and criminal, were tried before the admiral's court, and sometimes, as may be gathered from the preamble to that statute, without a jury.

In 1364 the right of the admiral to try cases of obstruction in rivers was recognised, by the issue of a writ of supersedeas to prevent the common law justices rehearing such a case which had already been before the admiral.

There is a record in Chancery of the trial before the admiral, in 1370, of a person named Peyntour, for piracy and adhering to the king's enemies; the jury was partly composed of merchants ("*per patriam et mercatores*"), and they acquitted the prisoner.

By the end of the fourteenth century the Court of Admiralty had well established its civil jurisdiction; this is shown by the divergent issues involved in the consideration of three of the cases which are recorded. These are (1) *Beche c. Vyweman*, a case of debt (maritime)—"*causa pecunia pretensa maritima*"; (2) *Draper c. Stellard*, a case of freight, and (3) *Nocolt c. Appe Hacche*, a case of ownership—"accione medietatis cujusdam navigii vulgariter Farecost nunciati."

Having regard then to these considerations, it is not difficult to see how this Court of the Admiralty gradually encroached upon the jurisdiction of the merchants' courts. The important mercantile towns were situated on the seacoast, and frequent disputes must have arisen in which the merchants were involved, disputes with regard not only to matters of buying and selling but as to matters arising upon the seas—such as questions of salvage, wreck, damage by tempest and freight. These matters the admiral claimed to have decided in his tribunal by virtue of the civil jurisdiction which he had created for himself in maritime affairs, and gradually his influence increased in the seaport towns themselves, so that slowly, but none the less surely, the court of admiralty drew away the business from the Staple Courts and transferred the causes to its own jurisdiction.

The merchants fought against this, but were finally compelled to

give up the struggle. In 1406 they petitioned for the custody of the sea to be entrusted to them, and with success, for one of their nominees was appointed admiral; but the scheme proved a failure, and the king proceeded to appoint John Beaufort as admiral in his place.

Our information as to the work of the court of admiralty during the fifteenth century is limited. In 1451 a warrant was issued for the arrest of John Fawconer and certain others in a maritime cause, in order to force them to meet the suit of one Thomas Williams in that court—"in quadam causa maritima sive quodam placito legum maritimam tangente." Another case mentioned^a as coming before this court was one for freight, but here the admiral's jurisdiction was called into question, and a prohibition was applied for; a similar objection arose in the case of alleged conversion of a "kele,"^b a *præmunire* being asked for, on the contention that the statute of Richard II. had been contravened.

Again, *Watertoft v. Jonesson* was tried in the time of Henry IV., before Henry Bate, a judge of the admiralty, at the port of "Sancti Bothi." It was a case of freight—"causa maritima pecuniaria viginti et quinque librarum pretextu effectamenti medietatis cujusdam craiere." This case is especially interesting in that it furnished several grounds for appeal; these were (1) that the court did not, in accordance with ancient custom, sit upon the quay—"Juxta fluxum maris"—but that it sat in the town itself, and right away from the edge of the sea—"in loco . . . extra omnes jurisdictionem Admirallitatis scituato; (2) that the constitution of the jury was improper in that it was not composed of merchants and mariners; and (3) that the trial was unfair.

The precedents to be found in that part of the Black Book of the Admiralty which deals with practice and procedure, are no doubt drawn from cases before the court during the fifteenth century, the period in which that portion of the book was written, and these precedents show that the tribunal adjudicated upon not merely criminal, but also mercantile and shipping cases.

In spite however of the advances of the admiralty court, litigants appear to have felt considerable hesitation in taking advantage of its process, and in order to strengthen its position a statute was passed^c in 1540 formally giving the admiral jurisdiction to deal summarily with cases of freight, damage to cargo and charter-parties.

The Law Merchant was administered in this court with reference to practically all maritime causes—damage to cargo, charter-party, bills of exchange, bills of lading, breach of warranty, &c., and it was there recognised more fully than later on in the common law courts. With

^a Rastell's "Book of Entries," fo. 24. ^b Ibid.

^c 32 Henry VIII. c. 14.

^d Vide 'Select Pleas in the Court of Admiralty' (Selden Society) 2 Vols.

regard to such bills of exchange as came before the court at this period, it is to be remarked that they were generally both drawn and made payable on the Continent.

From the pleas filed in the admiralty court^d we are able to gather some information as to the many issues tried by that institution; and from the same source come some interesting examples of bills of exchange, bonds and other products of the Law Merchant; and of these a few are given below.

*Fuller c. Thorne** (3rd March, 1533) furnishes an example of a bill of exchange: The defendant was indebted to the plaintiff in the sum of £10, and the bill ran as follows:—

"Be it known all men that I, Thomas Thorne, haberdasher, of the city of London have taken up by exchange to Thomas Fuller, merchant of the Staple of Callys, the sum of lx^{li} sterling, the which sum of three skore pounds sterling to be paid to the said Thomas Fuller or to the brynger of thys byll in the manner and forme folloyng that is to wyte the xxiiij daye of August next after the date of thys byll to pay xxx^{li} sterling and the xx day of September next folloyng to pay other xxx^{li} sterling of the whiche payments well and trewly to be payd to the sayd Thomas Fuller or to the brynger hereof at the days before wrytten, I the said Thomas Thorne bynd me myne ayres executors and assignes and all my goods. In wytnes whereof I the said Thomas Thorne have wrytten this byll wythe myne own hand subscrybyd my name and sett to my seale the xviiij daye of Apriell anno MVe xxviiij.

Per me Thomas Thorne

payd of thys byll the x day Octobre some 30 o o payd more the xiiij day of Septembre, sum (?) x^{li}

Received (?) per me John Westbey . . . the xxv day of Decembre x^{li} st."

Gale v. Browne. ^f Here there was a bill obligatory for the repayment of certain moneys advanced abroad for the use of a ship.

"Be yt knowne unto all men by this my second byll not being payd my fyrst nor thyrd I William Browne merchant of Tynbye and owner of the good shipe namyde the Trynite Jamys of Tynby in Wales at the present being at an anker in the bay of Cadiz in Spain knowledge that I owe unto Thomas Gale haberdasher of London x^{li} x^s sterling the which tene pounds and tene shillings sterling I promys and me bynd to pay unto the said Thomas Galle or to his assignes within xx dais after the save aryving of the said good shipe into the ryver of Temys the port of here ryght dyscharge And ys for so much that Henry Whelar delyveryde me for the last dyspache of my saide good shipe out of Caliz for the wiche payment well and trewly to be paide I bynde me and the sayde good shipe with all her aparell and freyght and all my goods wheresoever they may be found as well of this syde the see

* 1533 File 1 No. 36.

^f 1536, File 2, No. 34.

as beyende the see and for fawte of payment at the day I bynde me to pay change and rechange In wytnes whereof I have fyrmyd 3 byls of wonne tenore the wonne to be complied and payd and the other to stond as void and of none effect. Wrytin the iiij day Janyvar anno 1536 in Cadiz in the presence of this record here under wrytyn.

{ per record (?) per me Willielnum Browne."
Edmond Foster.

A judgment in favour of the plaintiff was in this case endorsed on the bill.

Harrison c. Stubbarde ^g was a case which turned upon a bill obligatory for the price of a ship; payable to one John Haryson or to "his certain attorney his heirs executors and assigns or to the presenter or bearer of this present writing at the feast of St. Michael the Archangel next come after the date of these presents."

Thorn v. Vincent.^h Here there was an action on a bill for money, lent at Messina, for the use of the ship 'St, Michael' of Barnstaple. A first decree was obtained against the ship, her freight and apparel.

Cope v. Fliett.ⁱ In this case reference was made to the Law Merchant. "... the maritime law use and laudable custom for 10, 20, 30, 40, 50 and 60 years before and since and also from and for a period the beginning of which the memory of man knoweth not, and oftentimes obtaining and observed in adverse judgment (Judicio contradictorio must mean judgment after argument, or perhaps judgment on appeal) as often as any man contracts agrees and bargains for certain things goods and merchandise to be put on board any ship and carried for a fixed sum if afterwards by him and by the act and fault of him who ought so to put them on board and lade or freight the ship it happens that according to such contract and agreement they are not put on board and shipped and the vessel be not laden with them that then the person so contracting and failing according to his contract and agreement aforesaid to load his goods things or merchandise or refusing to load the ship is bound and accustomed to pay and bear and satisfy to him with whom he has contracted for [the carriage of] such things goods and merchandise for their carriage, or, as it is called, for dead freight, the same sum freight and money's that he would and ought to have paid if they had actually been carried according to such agreement."

Chapman v. Peers ^j was a case concerning 3,000 lbs. of hops, and there was an allegation as to the custom of merchants with reference to the entering of goods in a bill of lading.

"On St Walston's day, namely, on the 19th day of January in the year of the Lord 1534.

Chapman against Peers }
Kydd Husse } on which day Husse alleged that if and so far as the hops mentioned in the pretended summary petition given

^g 1538 f. 5. ^h 1541 f. 7. ⁱ 1542 f. 11, No. 18. ^j 1534-5 f. 1. No. 7.

by the party of Chapman were carried and put on board Peers' ship, which the party proponent does not admit but expressly denies, yet the said Chapman ought not to and cannot have any advantage thereby, etc., because by the custom use habit and practice lawfully observed among merchants of London and Masters and Charterers (exercitores) of ships as well in this good court as in other courts it is the rule and is provided and it has also been repeatedly ruled in adverse judgments had in such suits between merchants of London, that owners and masters or charterers of ships or their pursers are not bound and ought not, nor is anyone of them bound or ought he to be bound to answer for goods or things carried or laden in the ships that are not entered, mentioned or inserted in the book of lading . . ." The sentence^k omitting formal parts, was as follows.—". . . Therefore I John Tregonwell . . . (*common form*) . . . pronounce decree and declare that the before named Thomas Peers ought of right to be bound to pay hand over deliver satisfy and restore the said 3,000 pounds weight of hops or their value; and I also decree and declare that he pay hand over satisfy and restore those hops to the said Thomas Chapman or to compound with him (for the same); and I condemn the said Thomas Chapman in the said 3,000 pounds of hops, which I assess at the sum or value of £10 10s. sterling . . . and in costs . . . (*common form*)."

In the case of *Barker c. Maynard*, which was tried in 1531, it seems that the argument was that the admiral's jurisdiction was complete and exclusive where the Law Merchant, or maritime—there called the civil law—applied; but this did not affect the right of the local court to hear such cases, where they arose within the jurisdiction, and of course it did not restrict the power of justices who had received a special commission to try any matter by the Law Merchant.

Such a commission of oyer and terminer had issued in 1383 to two King's Bench judges, in order that they might try, "*secundum legem mercatoriam*," a case of freight of certain wine which had been brought from Gascony to Ipswich. This action was first tried "*in curia nostra de Gipswico*," and the commission issued owing to the defendant's having improperly caused another commission to issue to a person named John Bek, so as to delay the matter. The issue of such a commission was always necessary at this period to bring these cases within the scope of the common law justices.

In 1291 a writ issued to the sheriff of Gloucester instructing him to make a sufficient levy upon the goods of the hundred, to compensate certain merchants for loss sustained by reason of theft committed from the body of the county; such loss was to be proved "*secundum legem mercatoriam*."^l

At the close of the fourteenth century we are left to infer from

^k F. 2, No. 74.

^l *Archæologia*, vol. 40, p. 93.

Copyn c. Snoke, that, in the case of the breach of a charter-party made abroad, English shipowners were without a remedy; and even in 1539 no jurisdiction was given to the common law justices to deal with such matters, for proposed legislation on the point was checked by the House of Lords^m. As for tort committed abroad, there was a decision of 1280 to the effect that the common law courts could not try such cases.

The admiralty court, having so many marine cases before it, and dealing so continually with foreigners, felt itself no doubt at much greater liberty with regard to such cases than did the common law courts, and this would naturally cause a feeling of jealousy to arise on the part of the latter, the consequence being that obstructions were later on thrown in the way of the further advance of the admiralty court at almost every opportunity.

In 1556 the case of Brian c. Brown was brought into the Admiralty Court "*super quadam billa obligatoria*," but a prohibition was issued on the grounds that the bond was, for the purpose of legalising proceedings in that court upon it, improperly alleged to have been made "*infra jurisdictionem marittimam*," whereas it had been in fact made in the body of the county of Lincoln, and further that this being so, the hearing would be in contravention of the statute 15 Richard II. c. 3. Again in 1559, in the case of Calclough c. Hound, a writ of supersedeas issued, quoting two statutesⁿ and alleging that the contract upon which the money was said to be owing, had been made at Calais — "*infra corpus cometatus Calisie*" and not "*in partibus ultramarinis*" — as set forth in the plea before the Admiralty.

In 1548 the admiralty court tried a case of insurance, and in 1593 the first mention is made of bottomry.

Finally, about the year 1570, the common law courts began to encroach seriously upon the then established jurisdiction of the admiralty court, and complaints were accordingly made to the queen by that tribunal, with the result that such encroachment was forbidden; but this command was disregarded, at least by the City of London court.

As the outcome of this dispute between the common law and admiralty jurisdictions it is supposed that an agreement was come to between them in 1575. There are several copies of this alleged agreement still in existence. It appears to have contained five clauses, of which the third ran as follows:—

"That the Judge of the Admiralty, according to such ancient order as hath been taken 2^o Edwardi primi by the king and his council, and according to letters patent of the Admiral for the time being, and allowed of by other kings of this land ever since, and by custom time out of memory of man, may have and enjoy the cognition of all contracts and other things rising, as well beyond, as upon the sea, without let or prohibition."

^m Lord's Journals, v. i. p. 112. ⁿ 13 Richard II. 1, 5, and 2 Henry IV. c. 11.

CHAPTER IV.

Some Sixteenth Century Bills.

From the admiralty files we are able to see the form which the bills of the sixteenth century took; some were under seal, and some, perhaps the majority, were not. Again, sometimes they appear to have been made payable to one person only, and sometimes to that person, his heirs, executors, &c., and sometimes to him or his assignee. The system of making sets of bills, too, seems to have been in vogue, and altogether this method of payment appears, at least among the merchants, to have made rapid strides, and such instruments, in this period, were no longer looked upon with any doubt, but were regarded as matters of everyday occurrence in the course of mercantile life.

A few examples, in addition to those in the last chapter, drawn from the files above mentioned are here given; some are set out *in extenso*, since they serve to show the varying forms of bill in use during the latter half of the sixteenth century.

1540, *File 17, No. 70*, was a first decree against a ship of White's for non-acceptance of a bill:—

"Jhesus, 1540, 26 day of July, in London, £118 18s. of current Flemish money."

"At usance for this first present bill of exchange pay to D. Barnard Calvalcanti one hundred and eighteen pounds eighteen shillings gross in current money for value received from Guido Calvalcanti and place [the same] to the account. . . . These letters of exchange are signed by Melia dux Spinola. These letters of exchange were addressed to D. Adrian de Brancho the younger in Antwerp." (In margin) "The tenor of letters of exchange translated into Latin from the Italian language."

1543, *File 16*: "Be it knowyn to all men be thys presents that I Alben Bynkys of Hull maryner do owe unto Malache Cogley of Kyngs Lenn xl^{li} iij^s iiij^d to be payd to the sam Malache or to his certyn attorney hys heyres or executors at the ffeaste of the exaltacyon of the holy crosse nexte comynge after the date hereof to the wyche payment well and truly to be made I do bynde my my (?) heyres and executors and my shyppe callyd the Margaret of Hull be this presentes. In Wyttnes wheroff to thys I have put my seale and subscriybed it with my marke. Dat. the xvj Daye of Julij in xxxv^{to} yere of Kynge Henry the viij.th"

1549, *File 18, Nos. 46 and 47*.—Bill written and signed by Raymon Troheta wherein he promises to pay to John de Sergos or bearer 209 crowns:—

"I Raymon Troheta do knowlege to owe to Mr. John de Sergos merchant of Bourdeaux the somme of two hundrethe neyne crownes

of the sonne by reason of a bargayne of wyne whiche he made unto me and delyveridde whereof I hold me contendidde, and promys to pay hym the somme of two hundrethe nene crownes before the fyve of this presentt month of December him or the bringar of this presentt in Tholowes and in token of the trewithe I have written and seynedde this presentt with myne owne proper handde in Bordeaux the xvjth daye of December 1549.

Raymon Troheta.

For ijc ix crownes of the sonne.

Again:—*Laus deo* 1553 ad primum (?) apriell in London. Worshipfull brother John Van Tricht pray you to paye by this my first bill of exchange by as farr as my second bill is not paid to the worshipful Nicholas Bell the some of xxx^{li} xvj^s the valour he receavid and put it uppon my account. And God be with you,
per me Simound Van Tricht.

1554, *File 24, No. 63*, mentions three bills of one tenor.

1554, *File 25, Nos. 85-86*.—Bill for £10 payable to "Harrye Wardon of Norwiche groser or his assignnis at the sytte here of," it goes on to set out the consideration; and is endorsed "to his worshipfull Mr. Wm. Browke or Mr. Gawnston geve these." (Not sealed.)

1562, "*Laus Deo* Andwarpe le 4 of September 1562 £50 0 0. At usans and halfe paye by this my fyrste byll of exchainge my second not beinge paid to Mykell Cruche or the bringer hereof the some ffyftey poundes sterlinge corant mony for merchandyse and ys for the valewe receyved here of John Turner at the daye make good payment and put yt to your accompte.

by me Richard Stanffeld.

Eccepted by me William Lewtie.

(Endorsed) to Mr. Lewteye servant to Richard Stainffylde dd in London pa."

1564, *File 37, No. 113*, is a case of contract for the loan of money by way of letter of credit to Vigo, the money was to be laid out in purchasing a cargo which was to be brought to London; the money was to be repaid on the ship's arrival in London, the lender bearing the adventure.

1570, *File 43, No. 110*, is a certified translation of a Dutch bottomry bill under seal and payable to "Lieven de Bruyn or to the bringer hereof at London aforesaid within eight dayes after that they aforesaid shipp shall have made her aforesaid viage from Blackwall . . . and shall have returned to London againe, all in safetie, and shall have ryden there at anchor fowre and twentye hours."

1575, *File 47, No. 54*, shows a Dutch Bill of Exchange, not under seal, payable on the arrival of a ship. A certificate of translation by public notary is appended.

1573, *File 45, 163*, is a Libel on a bottomry bond, a copy of the bond is to be found endorsed on the libel.

1599, *File 67, No. 131* (Fort c. Le Fort) is sentence for the amount due on a bill of exchange, drawn by the defendant upon Prince Dombes and payable to Ingram and another at Rennes, being the price of war material shipped by the plaintiff to Jersey upon the order of the defendant.

Only by the custom of merchants or the Law Merchant as administered by the court of Chancery, and formerly by the local courts, and later by the special jurisdiction of the admiralty, could such documents up to this date be recognised. But it must not be forgotten that had the court of Admiralty been unwilling to give effect to these customs and usages, it would never have acquired the extensive jurisdiction which it finally exercised. The laws of Oleron were here observed as much as in the early mercantile courts. In a case heard in the admiralty in the fifteenth century, a shipmaster was tried according to the laws of Oleron, for cruelty to a member of his crew, while in 1402 (4 Henry IV.) there was a petition by Parliament "que les admirals usent leur leies tant solement per la ley de Oleron et anxiens leyes de la mere et per la ley d'Engleterre et nemy per custume^a."

^aRot. Parl. 3, 498.

CHAPTER V.

The Law Merchant in the Common Law Courts.

As the Admiralty Court had in its time encroached upon the jurisdictions of the local courts, and finally brought about their decay, so in turn did the courts of common law at Westminster, by means of repeated prohibitions, wrest the administration of the Law Merchant from the Admiralty. It would seem that the common law judges treated the previous decisions of that court with entire disregard—probably considering them the judgments of an inferior tribunal. The result of this was that the common law courts had step by step to elaborate points which for years had been recognised in the Admiralty, and to do endless work in the course of what may be called the “re-development” of the commercial and maritime law.

An example of this is the case of the liability of a shipmaster for loss of cargo by theft, a question of liability which, as has been shown above, had been long ago decided, yet we find that in 1671 the same point was being carefully discussed. The law in the case of *Morse v. Slew*^a had been already clearly defined in 1640^b. In like manner the respective doctrines involved in the law of negotiability, bills of exchange and lading, insurance and so on, had all been fully discussed in the Admiralty Court during the Elizabethan and Stuart periods, whereas until much later they rarely arose for consideration in the common law courts. But these courts, in the course of their re-development, followed very closely upon the lines of their predecessors, with the consequence that the commercial law of to-day has come down to us in fairly direct descent. The changes in its administration from the Staple to the Admiralty and from the Admiralty to the Common Law courts may have caused delay in the perfecting of the Law Merchant, but they can hardly be said to have otherwise seriously interrupted its steady advance and elaboration.

Sir Matthew Hale stated that the “civil law,” in so far as it could by English law be applied to maritime cases, was so applied both by the admiralty and common law courts; this being so, it is obvious that once the latter gained the upper hand, they, alone holding the administration of the English law, were in a position to say how far this “civil law” should or should not be adopted.

This administration of the Law Merchant by the common law courts was not popular with the mercantile community, for its members were, as above intimated, put to the necessity of once more forcing the courts to recognise their peculiar usages by offering evidence of their customs; while the general inconvenience experienced by merchants during the transition period, must have been considerable. If one of the parties was, as no doubt was frequently the case,

^a 3 Keb. 72, 112, 135.

^b Admiralty file 102 No. 299.

dissatisfied with the determination of a suit heard in the Admiralty, it was open to him, by means of a prohibition, to have the whole matter retried by a tribunal not so well versed in mercantile affairs.

If the merchants had gone to the Chancery they would probably have fared better, for there the doctrines and practice obtaining were not dissimilar to their own. The Chancellor and the merchants were both anxious to favour the *bona fide* purchaser, and accordingly disregarded the common law rule "*nemo dat quod non habet*"; while in Chancery, as in the merchant courts, the actual parties to an action could appear as witnesses, a thing which was unheard of in common law suits until the middle of the nineteenth century.^c By Malynes, an early writer on the Law Merchant,^d we are told that the Chancellor issued decrees empowering the administration of the oath to parties to the action,^e and that similarly for the sake of speed the Law Merchant permitted this to be done in mercantile suits.^f But the merchants did not go to the Chancery, and it is to Lord Mansfield and his successors on the judicial bench that we owe our modern Law Merchant.

✓ Thus from customs, dating back through many centuries, and obtaining among a very limited class of the population, has our modern commercial law arisen: from informal courts presided over by non-professional judges, to the ordinary courts of the land has the administration of that law passed: and from a system, the advantages of which were open to a few, to an important part of our common law, the advantages of which are open to all, has that original collection of customs advanced. To the continued efforts of the merchants, occasionally aided by statute, we owe many of the modern business conveniences which we enjoy: bills of exchange, charter-parties, bills of lading, promissory notes, cheques, and so on are all traceable to the work of the merchants, and to them we are indebted for the important doctrine, among others, of "negotiability."

^c14 and 15 Vict., c. 99; ^d 1622; ^eMalynes, p. 299; ^fIbid., p. 92.

CHAPTER VI.

Negotiability.

As has already been stated, we owe to the body of merchants, which for centuries has been struggling for the supremacy of their peculiar doctrines and customs, many of the commercial advantages which are now open to all.

Of these perhaps the most important and the most interesting, at least from the historical point of view, is the doctrine of negotiability; for without this a large number of our modern instruments would be useless, and the commercial enterprise of the present century severely handicapped.

Four quotations from eminent authorities aptly describe the important influence of the Law Merchant in regard to negotiability. Wilde B. said, "The Law Merchant validates, in the interest of commerce, a transaction which the common law would declare void for want of title and authority"^a; Bigelow^b said, "It is here that the Law Merchant appears in its strongest colours and in its most striking contrast to the common law. It is negotiability that affords this colouring and contrast"; again, Byles J. said, "The object of the Law Merchant as to bills and notes is to secure their circulation, therefore honest acquisition confers title. To this despotic, but necessary principle, the ordinary rules of the common law are made to bend"^c; and finally, Blackburn J., in *Crouch v. Credit Foncier*^d, gave it as his opinion that "bills of exchange and promissory notes are by the Law Merchant negotiable in both senses of the word. The person who . . . becomes holder may sue in his own name on the contract and . . . he has a good title notwithstanding any defect of title in the party . . . from whom he took it." So did the Law Merchant triumph over the common law doctrines.

The history of negotiability is naturally very closely connected with the development of the negotiable instrument, and it is to these we turn in tracing the growth of a doctrine which is nowadays of so much consequence. Ancient Teutonic like ancient Roman Law perceived considerable difficulty in the assignment of a debt, or the benefit of a contract, the debtor being placed, by such an attempted transfer of rights, in a position to plead that he had not covenanted to pay the transferee. Again, such a transfer would be of an incorporeal right, and not a corporeal thing; this was a great obstacle in the way of negotiability. But in the thirteenth century men appeared in the king's courts "by attorney," the idea of representation being supplied by the king himself, who was represented in the various state

^a *Swan v. N.B.A.* 1862, 7 H. and N. 634; 31 L.J. Ex.436.

^b *On Bills and Notes*, 206. ^c *Swan v. N.B.A.* 1863, 2 H. and C. 185;

^d 1873 L.R., 8 Q.B., 374-382.

departments. Then the debtor promises to pay the creditor "or his attorney," creating thus a sort of power of attorney. Usually such an attorney was under a condition to produce the document containing this promise, and in addition to this he might, as shown above, be called as a witness. The probability is that gradually the document or bond came to be looked upon as the contract itself rather than the evidence of it, and so the contract came to be considered as "a thing," and consequently corporeal, and so transferable.

It is not an easy matter to trace the actual development of the negotiable instrument, since none of the accepted writers dealt more than cursorily with the subject. Malynes, who wrote as a merchant rather than as a lawyer, is in many points discredited,* but the exhaustive investigations which the matter is undergoing at the present day at the hands of recognised continental authorities may shortly serve to make our knowledge very much more definite: there is no doubt however that our modern negotiable instruments are traceable to the usages of merchants of the thirteenth and fourteenth centuries.

There appear to be three several stages in their development; these are (A) the growth of the foreign bill, (B) that of the inland bill between traders, and (C) the extension of both of these to non-traders.

With regard to the first of these, the two earliest known examples of foreign bills are dated 1339 and 1404. The one dated October 5th, 1339, was drawn by Barna of Lucca on Bartalo Cassini and Co. of Pisa, payable to Landuccio Bustraghi and Co. of Lucca in favour of Tancredi Bonaguinta and Co. The document was addressed to Bartalo Cassini, 2 Compagni, in Pisa, and the following were its contents:—

"Al nome di Dio amen. Bartalo e Compagni. Barna da Lucca e Compagni salute. Di Vignone. Pay herete per questa lettera a di XXdi Novembre 339 a Landuccio Busdraghi compagni da Lucca fiorini trecento dodici e ter quarti d'oro per cambio di fiorini trecento d'oro, che questo di della fatta n'averemo da Tancredi Bonaguinta e compagni, a raxioni di IIII e quarto per Calloro vantaggio, e ponetea nostro conto e ragione. Fatta di V d'Ottobre 339. Francesco Falconetti ei a mandate a paghare per voi a gli Acciaioli sendi CCXXX d'oro."†

These bills had four instead of three parties; and this additional party was the presenter, presentment being then of the utmost importance; later on, indeed, the insertion into the bill of such a phrase as "any one who presents these letters" is not uncommon.

The explanation of this doctrine of presentation is to be found in the idea of symbolic delivery, which had so firm a hold upon the German mind, being to a great extent disregarded by the Lombards and Anglo-Saxons. The Lombards were the great bankers of the

* vide L.R. 10 Exch. 347.

†Printed by Brunner, Zeitschrift für Handelsrecht xxii. 8.

world, and their system, at first commanding respect, finally overruled the German notion of the written contract. So far from regarding this document as the actual contract, or even the right itself, the Lombards and Anglo-Saxons seemed to look upon it rather as the pledge or security for the performance of the contract: its production was necessary when the advantages of it were claimed. From this they soon arrived at the stage when they said that anyone who produced this pledge was entitled to ask that it should be redeemed, by performance of the within written contract—at least this was so when such a presentation clause as above mentioned was inserted. There are two illustrations of this:—

(1) A writing found in 771 where a monk made over his right to revenge in the event of his being killed—*per si aut per illum hominem cui ipse hanc cartulam dederit ad exigendum*: ^g and

(2) A form frequently found in MS. from the early part of the ninth century onwards—“*Vel cui istum breve in manu paruerit in vice nostra.*” ^h

In these cases the transferee, or holder, was considered as the grantor's agent. The logical conclusion to draw from this idea of pledge and security is that the presumption was that if the creditor failed to produce the document, he had already realised upon it, and so, if the document was returned to the debtor there was a release of the security. Hence the origin and importance of the doctrine of presentation.

Between the middle of the thirteenth and the fourteenth centuries came the transition stage in the development of these documents from assignable bonds into the modern bill of exchange; the following are two examples of documents during this period.

(a) “I signify to you, being present, that I hold it confirmed that whereas you gave and assigned 100 marks which you held payable to me on the feast of Martin next following, that I hold you and those claiming through these presents, quit and absolved from the payment of the said 100 marks.” ^j

(b) This is a document, dated 1341, addressed to the consuls, one Fleury of Lon and John Pape. It recites a sale and goes on to say—“We promise to pay to him 9 marks and 12 pence 14 days after sight of these presents—(“*post visionem presentium.*”)” ^k

In 1391 the Piacenza Ordinance, already referred to,¹ was promulgated compelling campsores to give an acknowledgment in writing of all moneys deposited with them; and in 1394 (March 18th) the magistrates of Barcelona issued an ordinance to the effect that any person who received a letter of exchange should within twenty-four

^g Loersch and Schröder No. 32.

^h cf Codex Cavensis vol. i. No. 11, vol. ii. Nos. 11, 221, 225, 242.

^j 1279 Loersch & Schröder No. 147.

^k Loersch & Schröder No. 196.

¹ p. 7 Supra.

hours indorse upon it his decision as to acceptance or dishonour, adding the date of such indorsement : there was also a provision that there should be a presumption in favour of acceptance on failure to indorse as above directed (' que lo dit cambi li vage per atorgat ') Some half century ^m after this Louis XI. of France in creating, or perhaps reviving, a certain quarterly fair at Lyons, instituted a court having jurisdiction over what he termed 'lettres de change'—papers which affected the merchants who were in the habit of visiting the town." ^a

Again, Pegoletti of Florence mentioned, in his book '*Practica della Mercatura*' ^o '*scritti de cambio*.' The case of *Spinula v. Camby* ^p turned upon a bill or letter of exchange. The facts were shortly as follows:—On 3rd June 1439, Bernard and Mattias Ricy of Avignon gave a 'fist ung change' to one Cherruche of Bardiz, for the sum of 450 florins. This bill was drawn upon one Marian Rau, and payable at Bruges to Bernard Camby and another. Rau paid the full amount to Camby within a short time of the bill's arrival in Bruges, but Camby 'protested' it for non-payment and returned it to Avignon with the protest, with the result that Bernard and Mattias Ricy aforesaid paid the money. Rau's rights passed to her brother Odo and thence to Spinula the plaintiff. The defence raised was that before the assignment to the plaintiff, Odo Rau had become bankrupt and that the property and debts passed to the creditors equally, and secondly that the defendant never had any dealings with Odo, and so the plaintiff should have sued in Rau's name. Two arbitrators were called in, they were both merchants, one from Lucca, the other from Pisa, and it was held on 20th March, 1848, that the plaintiff must be non-suited, the attempted transfer of rights being useless. It would seem then that early in the fifteenth century a complete system of bills was in operation. In the sixteenth century the transferee of a bill in France was compelled to give evidence of his title, and by the middle of the seventeenth century the practice of indorsement was fully established.

The indorsement consisted in the signature of the payee, whereby the holder became his agent. This was distinguished in the Ordinance de Commerce of 1673 from an "order" containing the name of the purchaser and date, making the indorser full owner. A tenable theory with regard to the origin of indorsement is that the use of the terms "brief" and "lettre" kept alive the original form of the document; this being so, the writing, or indorsement, which was practically an address to a new holder, would be inscribed upon that part of the letter where the address was generally to be found, that is to say on the back. In the earliest forms of bills the name of the drawee was always "indorsed."

^m 1642.

ⁿ Recueil général des anciennes lois françaises, by Isambert, Jourdan & de Crusy (ed. 1825) x. 451-6.

^o Attributed by Martens to the beginning of the fourteenth century.

^p Printed in Zeitschrift für Handelsrecht xxii 22-24.

From the foregoing it is clear that the foreign bill was recognised by continental law, and it is thus left to consider the subject with regard to the English law. Here foreign bills were, in their earlier stages, grounded upon our already accepted legal doctrines such as trespass^q or debt, rather than on any particular custom of merchants. This is shewn by a case where A., a French merchant, paid 1400 crowns to B. who drew a bill in France; the bill was sent to one Capayee in England, and D., the drawee in England, was sued by A; A. was declared to be Capayee's factor, and B. to be D.'s factor, so that the plaintiff was supposed to pay the defendant in France because the defendant had paid in England. In *Martyn v. Boure*,^r the earliest English bill of exchange case (1603), the defence was raised that there was no priority of contract. Here the basis of the claim was assumpsit, but the action was between the acceptor and the drawer, the bill being in evidence merely while assumpsit was the basis of the claim. Later on the necessity arose of alleging some special custom, in order that negotiability should be recognised. In *Oaste v. Taylor* (1613),^s an action by the payee against the acceptor of a bill, the claim was based upon the special custom of London, the declaration running:—

“Whereas by the custom of London, between merchants trafficking between London and parts beyond the seas, if any merchant commorant in London and trafficking beyond the seas, direct his bill of exchange bona fide and without covin to another merchant commorant beyond the seas and trafficking between London and the parts beyond the seas, upon such a merchant's accepting a bill, and subscribing it according to the use of merchants it hath the force of a promise to compel him to pay it at the date mentioned in the bill.” After this it was held that assumpsit would not lie in the case of bills of exchange.

This special custom above mentioned had at first not only to be alleged, but proved as well, then the time came when it need only be alleged, and the proof was dispensed with. Thus in *Carter v. Downich*,^t in the time of James II., it was held sufficient to say “according to the custom of merchants.” Next it was held in *Bromich v. Lloyd*,^u that it was unnecessary to allege any custom at all. So much for the recognition of the foreign bill generally, but some time had still to elapse before recognition was accorded by the courts to some of the incidents of these bills. Upon the introduction of bills to bearer they at first refused to acknowledge any bearer's rights (*Buller v. Crips*),^v and not until *Miller v. Race*^w was the innovation firmly established. The “bearer” question arose, and was the subject of much discussion in the comparatively recent case of

^q cf. The case of certain Frenchmen of Bordeaux (1274) p. 9 Supra.

^r Cro. Jac. 6.

^s Cro. Jac. 306.

^t 1 Shower 124: ^u 2 Latw. 667. ^v (1704) 6 Mod. 29. ^w 1 Burr: 452.

Crouch v. The Credit Foncier.^x Similarly in the matter of "days of grace" the custom had at first to be proved. (*Tassel v. Lewis*), and then this requirement was dispensed with (*Brandao v. Barnett*).^y

With regard to the inland bills their earlier history was summarised in the case of *Buller v. Crips* (supra) where Lord Holt said, "I remember when actions on inland bills did first begin, and then they laid a particular custom between London and Bristol. The defendant's counsel wished to put them to prove the custom, at which Hale, the judge, laughed. In my lord North's time, it was said the custom in that case is part of the Common Law of England." Instruments other than bills of exchange were not so readily recognised by the courts. Lord Holt would not "take his law from Lombard Street," with the result that promissory notes had to be recognised by statute.^z Bank notes received recognition in 1758,^a cheques and drafts in 1764^b and exchequer bills in 1820.^c

An interesting point of comparison between English and French ideas on the subject may be mentioned here. The English law is based upon the banking and currency theory, whilst that of France rests upon the mercantile theory, and this leads to several differences between the two systems. In England is created a paper currency, in France a trade transaction merely, with the result that in England consideration is presumed, whilst in France it must always be proved. In England a bill may be drawn and paid in the same place, but in France the places must be so far distant one from another that a rate of exchange exists between the two: hence in France bills are payable to "order" only, whilst here they may be payable to either "order" or "bearer."

The final stage in bills was reached when they became binding between persons who were not merchants. At first this result was arrived at by the setting up of a legal fiction that the person in question was a merchant, next the allegation that there was a custom that such documents were binding between merchants and others residing within the realm was held good, and lastly the allegation was dispensed with so long as the instrument was in a certain form. In *Woodward v. Roe*, overruling *Englechild's* case, it was said that "this course of accepting bills being general custom both within and without the realm, the court must take notice of the custom." But it was not until comparatively recently that such incidents of negotiability as the effects of material alterations, fraudulent signatures, or fraudulent creation of such instruments were determined, and not even yet have all the questions connected with these documents been definitely decided.

^x (1873) L.R. 8 Q.B. 374. ^y (1846) Clark and Fin. 787.

^z 3 & 4 Anne c 9. ^a *Miller v. Race* 1 Burr: 452. ^b *Grant v. Vaughn* 3 Burr 1516.

^c *Wookey v. Pole* 4 B. & Ald. 1; 22 R.R. 594.

An important point requiring settlement was whether or not negotiability was confined to those instruments recognised by the ancient custom of merchants. In *Crouch v. Credit Foncier*^d Blackburn J. said "usage cannot have the effect of conferring negotiability on a document not negotiable by the ancient Law Merchant." In that case it was sought to treat as negotiable certain foreign bonds payable to bearer, and it was contended that persons who dealt with such bonds were estopped by the form in which they were issued, but to this Blackburn J. replied that he failed to see how the company could estop anyone but itself in issuing the bonds, while to estop later holders would be contrary to the rule of law that titles derived from finders and thieves are precarious and liable to be called into question. The opinion of Blackburn J. was grounded upon the view that *immemoriality* is the true test of custom, but in the later case of *Goodwin v. Roberts*^e the House of Lords decided that *universality* is the test which must be applied.

^d(1873) 8 Q. B. 374; 42 L. J. Q. B. 183.

^e(1876) 1 App: Cas: 476; 45 L.J. Ex 748.

CHAPTER VII.

The Idea of Negotiability.

In this chapter it is proposed to examine the idea of negotiability. In the first place, negotiable instruments are classed by English lawyers among 'choses in action,' but unfortunately complete agreement as to the precise meaning of this term is lacking, and thus it is not easy to say exactly in what sense these instruments are 'choses in action.'

The term includes everything that cannot be seized by a sheriff under a writ of *fi. fa.*, according to Blackstone and Lord Thurlow, but the definitions of Blount ^a and Williams ^b are wider. All the definitions include money due and the benefit of a contract, and most of them compensation for an injury, but in none of these senses is a negotiable instrument a 'chose in action.'

But there is another sense in which this term may be used; "a chose in action is a written instrument which is in itself the evidence of a right." Such a use of the phrase is entirely figurative, and it is the one in which negotiable instruments may most properly be classified as choses in action. The actual document or 'thing,' is always transferred.

This view is strengthened by the considerations, already mentioned, that the earliest instruments were regarded as pledges or securities for debts, and without their production no claim could be made, while their return extinguished the debts which they represented. Here too is a possible explanation for their earlier name being, not 'chose in action,' but 'right and action.' What at one time was a mere right coupled with actionability to enforce it, became, as soon as there was tangible evidence of that right, 'a chose' but 'in action.'

It is suggested that the original meaning of negotiability was 'transferability,' but that as this quality became extended to other choses in action, negotiability gradually came to imply freedom from equities, and power on the part of the holder of an instrument to sue upon it in his own name.

Nearly all the text books carefully distinguish 'assignability' from negotiability,' and there are several recognised differences between the two. First, assignable instruments require some evidence of assignment, while those which are negotiable are transferred by mere delivery: secondly, while consideration is necessary in the case of assignment, it is not essential for the valid transfer of a negotiable instrument, thirdly, it is said that assignment is subject to, while negotiability is free from, equities; fourth, an assignment gives the transferee no better title than that of the assignor, this is not so in the case of negotiability; and fifthly, the debt assigned cannot be discharged without consideration, that which is negotiated can.

^a Blount's Law Dictionary.

^b Williams, Personal Property.

It is desirable then to examine these points with a view to ascertaining whether or not they are essential points of divergence, and if so, how far they can be said, at the present day, to be based simply upon the custom of merchants.

Assignability is no longer a peculiarity of the negotiable instrument. The old rule that a chose in action could not be assigned has now given way to so many exceptions, that few cases remain in which transfer is impossible. Moreover there is one class of instruments which is said to be assignable but only quasi-negotiable, namely bills of lading; and it is to be noted that it is not essential to a bill of exchange that it should be transferable from one person to another; thus, a bill which is drawn neither to 'order' nor to 'bearer' is negotiable in that days of grace are allowed, but it is not transferable.

Transferability therefore, in the abstract, is not peculiar to the negotiable instrument, but what *is* peculiar is that while other choses in action requires some fixed legal or equitable form for their valid transfer, these instruments, by reason of the fact that they are to be regarded as 'things' are sufficiently transferred by delivery of the paper. Thus the difference between negotiable instruments and other choses in action is, so far as transferability is concerned, confined to the mode of transfer.

Again, with regard to the question of consideration; in the creation of any right of action consideration is necessary, and to this rule negotiable instruments contribute no exception. For centuries a pre-existing debt had been regarded by the English Law as consideration for a promise to pay, and this whether the promise be in ordinary contractual form or whether it be in the special form of a bill of exchange. Consideration has been said to be necessary as between assignor and assignee, but not as between parties concerned in the transfer of negotiable instruments.

Sir William Anson says that, in an ordinary contract, the assignee would have to show that he had given consideration to the assignor for the assignment; ^c he points out the equitable origin of the doctrine, but treats it as incorporated into the Judicature Act of 1873, and therefore as being of general application. Snell supports the view taken above, and in this he is apparently followed by Mr. Leake, who says that "Equity treated the assignment of a legal chose in action, as importing an agreement that the assignee should use the assignor's name in proceedings at law to realise the chose in action, which agreement, if supported by consideration, the Court would specifically enforce." ^d

Again, Mr. Blake Odgers upholds the necessity of consideration in the case of such assignments—except those under Sec. 25 of the

^c Anson: Contract, 9th ed. p. 250.

^d Leake: Equity, 12th ed. p. 85.

Judicature Act, ^e and this is supported by Storey ^f and Smith, ^g so that the theory has many eminent supporters, although several writers, such as Fry L. J., Williams and Sir F. Pollock are silent upon the subject. The doctrine is by no means new, for Fonblanque mentioned and approved it in his notes. ^h But in *Lord Carteret v. Paschal* ⁱ it was recognised that a voluntary assignment of a chose in action might be valid. The theory as to the necessity for consideration in such cases, has never been borne out in any of the cases quoted in its support, and there would seem to be no real justification for the doctrine. Certainly it appears illogical, for consideration arose from the contract, and not from its assignment.

That voluntary assignments of choses in action have been upheld by courts of Equity, has been shewn since the Judicature Acts, by the decisions in the cases of *Harding v. Harding* ^j and *Walker v. The Bradford Old Bank*, ^k which appear conclusive against the view that consideration is necessary. If this conclusion be correct, it is not difficult to understand why consideration ordinarily has not to be proved as between any two parties to a negotiable instrument, and it may explain why, when fraud or illegality has tainted one of these documents, it may become necessary to prove consideration.

Another consideration in the difference between "negotiable" and merely "assignable" instruments, is the question of "freedom from equities"; whether or not there is an essential distinction at the present day, between the ordinary chose in action assigned, and the mercantile instrument negotiated, is a matter not altogether free from doubt.

There are two views according to which freedom from equities is accounted for. The first is that the holder cannot be objected to because the document constituted a promise to pay anyone. This promise is presumed, not with regard to the assignment, but to the original undertaking; thus, A. does not promise B. to pay C., but A. is taken to promise C. originally, and this is comparable to the promise made by the owner of a lost article to pay a reward to the finder of that article. The second view is that freedom from equities rests upon the doctrine of estoppel; and in neither of these cases is it the Law Merchant which is appealed to, but the general law of the land. But the doctrine of freedom from equities does not apply to all negotiable instruments, as such, for instance, it does not affect a forged, materially altered, or overdue bill of exchange. On the other hand, however, it may be made, by express agreement, ^l a quality of assignability, the difference being then, that in the case of the

^e Encyclopædia of the Laws of England, vol. 1. p. 356.

^f Equity Jurisprudence 2 Eng. edit. p. 691.

^g Smith, Principles of Equity, 2nd Edit. p. 334.

^h See also *Bates v. Danby* 2 Atk. p. 207; and *Jewin v. Vobe*, *ibid.* p. 407.

ⁱ 3, P. Wms., 199:

^j 1886. 17 Q.B.D. 442.

^k 1884 12 Q.B.D. 511.

^l In *re Agra v. Masterman's Bank* (1867) L.R. 2 Ch. 391; 36 L.J. Ch. 222.

negotiable instrument, freedom from equities is presumed, but in that of the chose in action assigned the presumption is in favour of subjection to equities.

Some writers appear to confuse the two senses of the word "title"; the term when used in this connection merely denotes the right to sue and not the terms upon which that right is exercised. A person who holds by an ordinary assignment has as good a title, or right to sue, as one who holds by an ordinary negotiable instrument, but in the former case the right is subject to, while in the latter it is free from, equities; both holders have however a good title, and at the present day each of them can sue in his own name. Hence in so far as this doctrine of freedom from equities is concerned, it is no longer true to say that it affords a distinction between "assignability" and "negotiability."

The contention that the application of the doctrine of transferability to bills and notes affords them a distinguishing feature, is defeated by four different considerations. Assignees of covenants running with the land could and can sue in their own names, not through the instrumentality of the Law Merchant, but because the covenant was made with the occupier, for the time being, of the land; in other words the covenant was "ambulatory." Similarly, it was said that the promise to pay ran with the bill or note, not with the assignment, since it was a promise to pay the bearer or holder for the time being^m. Then too, all choses in action might be sued upon, in equity in the name of the transferee; a fact which goes to show that the distinction, if any, was rather one of courts; and finally, many modern jurisdictions have abolished any difference between negotiable instruments, and other choses in action, with regard to holders or assignees of them suing in their own names.

It has been said that "the question whether the transfer of an instrument . . . gave the transferee the right to sue in his own name on the contract contained in it, is an infallible negative test of the negotiability of the instrument,"ⁿ but it is not a positive test, for there may be a right to sue in the holder's own name, and yet he may not have a good title (because of the defects in the title of the transferor).

These are not identical, and both tests are required. The editors of Smith's Leading Cases, in the notes to *Miller v. Race*, remark "it may be laid down as a single rule that where an instrument is by the custom of a trade transferable like cash by delivery, it is also capable of being sued upon by the person holding it pro tempore, there it is entitled to be sued upon as a negotiable instrument, but if either of the above requisites be wanting . . . it is not a negotiable instrument." It is on this ground that bills of lading are only quasi-negotiable, they

^m Per Story J. in *Bullard v. Bell* 1817; *Mason*, 243.

ⁿ *Campbell on Sale* 89.

give the right to the holder to sue at law in his own name, but that holder gets no better title than had his transferor.

It is often said that honest acquisition confers title in the case of a negotiable instrument, and that the reason of a holder who takes through a doubtful title being free from equities, is this quality of negotiability which rests on the Law Merchant. Then Lord Cairns in *Goodwin v. Roberts*^o formulated the doctrine of negotiability by estoppel.

This rule as to honest acquisition conferring good title is comparable to the rule as to sale of goods in market overt, whereof Cockburn C. J. said "when shops were few, and the practice was to sell in market, people whose goods were stolen would know where to find them, so that if a man did not pursue his goods to a market where they were openly sold, he could not interfere with an honest buyer."^p Similarly it has been laid down that "every holder of a bill has his title stamped on the bill itself," and that a thief can give a good title because "bills are so like money" that they "represent money." Hence the suggestion follows that it is a universal principle of law forming an exception to the maxim "*nemo dat quod non habet*," that when one person by his conduct seems to make another the owner of the thing in question, the latter, having all the outward signs of ownership, can give a good title; or at least the former is, by that conduct, precluded from denying the title of the bona fide transferee. This view has been taken by Canadian and American judges with regard to instruments which are not negotiable, and Lord Herschell looked upon the matter almost as broadly, saying 'if the owner of a chose in action clothe a third party with the apparent ownership, and the right of disposition, he is estopped from asserting his title against the person to whom the third party has disposed of it.'^q If this statement be correct with regard to ordinary choses in action, then they are invested with all the qualities which have been claimed for negotiable instruments. The same principle was applied in the *London Joint Stock Bank v. Simmons*.^r

It is however certain that the holder of an assigned contract may be called upon to prove his title, whilst such is not the case with the holder of a negotiable instrument. It is worthy of note that in the sixteenth century the French law produced a reaction against this rule, upon the contention that 'un simple transport ne saisit point,' and this led to bills being drawn in blank. Eventually the French law was compelled to give way to the general practice of endorsement.

The foregoing considerations make it a matter of some doubt as to whether it can be said that there is, in the abstract, any distinction

^o 1876, 1 App. Cas. 476; 45 L. J. Ex. 748.

^p *Crane v. London Dock Co.* 1864, 5 B. and S., 313; 10 Jur. N. S. 984.

^q *Colonial Bank v. Cady* (1890) 15 App. Cas. 267. 60 L. J. Ch. 131.

^r 1892 A. C. 201. 61 L. J. Ch. 723.

which, at the present day, can be drawn between assignability and negotiability. There can be no question that historically the differences were real and distinct, and it is probable that in this branch, as in so many others, the law proceeded piecemeal, deciding point by point as it arose, and that while the Law Merchant formed an excellent working basis for judicial decision no attempt at formulating a theory was made.

It is open to doubt whether, even at the present day, our law is in a position to generalise; the probability is that we shall continue to use words which mark no genuine distinctions, for some time to come, and that nothing short of a scientific codification will reduce this chaos into any systematic arrangement.

Perhaps the truth of the whole matter is that the qualities of assignability, not being subject matter at all of the common law, were developed in connexion with the idea of negotiability under the influence of negotiable instruments, but that when assignability of choses in action came to be recognised by statute, many of the distinctions of the negotiable instrument became common to all classes of choses in action.

DB ATN PTh
The history of the law merchant
Stanford Law Library



3 6105 044 227 085